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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

JOHN FITISEMANU; PALE TULI;
ROSAVITA TULI; AND SOUTHERN
UTAH PACIFIC ISLANDER
COALITION;

Plaintiffs,

v.

UNITED STATES OF AMERICA;
U.S. DEPARTMENT OF STATE;
REX W. TILLERSON, in his official
capacity as Secretary of the U.S.
Department of State; and
CARL C. RISCH, in his official
capacity as Assistant Secretary of State
for Consular Affairs;

Defendants.

Case No. 1:18-cv-00036-EJF

**BRIEF OF CITIZENSHIP
SCHOLARS AS AMICI CURIAE IN
SUPPORT OF PLAINTIFFS**

Magistrate Judge Evelyn J. Furse

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Amici Curiae are scholars of law, history, and political science who have written on the history of American citizenship. *Amici*'s names, titles, and institutional affiliations (for identification purposes only) are listed in Appendix A. *Amici* have a professional interest in the doctrinal, historical, and policy issues involved in this Court's interpretation of the meaning of citizenship in the United States. Moreover, *amici* have a professional interest in historical conceptions of citizenship before and after the ratification of the Fourteenth Amendment's Citizenship Clause, modern notions of citizenship and non-citizen national status, and their impact on policy today.

Amici submit this brief to provide insight into the historical record relating to two primary points relevant to this case. First, although the original U.S. Constitution did not identify any qualifications for citizenship, its references to citizenship are best understood against the principle inherited from English common law and recognized in *United States v. Wong Kim Ark*, 169 U.S. 649, 667 (1898), which *Wong Kim Ark* termed *jus soli*—"the right of the soil." Second, the designation of American Samoans as "non-citizen nationals" has no precedent in antebellum America. Rather, that designation is an unconstitutional exception to the principle of *jus soli* citizenship, invented by administrators and legislators

operating under racialist presuppositions during America’s territorial expansion at the turn of the twentieth century.

ARGUMENT

I. *Jus Soli* Citizenship—Flowing From the Place of Birth—Has Deep Roots in the American Tradition, Drawn From English Common Law.

Plaintiffs in this case invoke “the right of the soil”—*jus soli*—as the basis for their right to citizenship. Under that doctrine, all people born within the dominion and “allegiance of the United States” are citizens of the United States. *United States v. Wong Kim Ark*, 169 U.S. 649, 655 (1898). The rule has deep roots in the American tradition and is drawn from the English common law.

A. *Jus Soli* Was the English Common Law Rule.

The 1789 U.S. Constitution repeatedly uses the term “citizen,” but until the ratification of the Fourteenth Amendment, the Constitution did not expressly identify who was (or was not) a U.S. citizen. *See Lynch v. Clarke*, 1 Sand. Ch. 583 (N.Y. Ch. 1844). As the Supreme Court has long recognized, terms used but not defined in the Constitution should be read “in the light of” English common law, because the U.S. Constitution is “framed in the language of the English common law.” *Smith v. Alabama*, 124 U.S. 465, 478 (1888); *see also Carmel v. Texas*, 529 U.S. 513, 521 (2000) (finding that for an undefined term in the Constitution, “the necessary explanation is derived from English common law well known to the

framers”); *Wong Kim Ark*, 169 U.S. at 654. Accordingly, early U.S. courts turned to English common law to inform their understanding of citizenship. *See Dawson’s Lessee v. Godfrey*, 8 U.S. (4 Cranch) 321 (1808) (applying common law to determine citizenship); *M’Ilvaine v. Coxe’s Lessee*, 6 U.S. (2 Cranch) 280 (1805) (same). And when they did so, American courts concluded that, although citizenship and subjecthood are distinct, “[s]ubject’ and ‘citizen’ are, in a degree, convertible terms as applied to natives; and though the term ‘citizen’ seems to be appropriate to republican freemen, yet we are, equally with the inhabitants of all other countries, ‘subjects,’ for we are equally bound by allegiance and subjection to the government and law of the land.” *Wong Kim Ark*, 169 U.S. at 665; *see also Leake v. Gilchrist*, 13 N.C. 73 (1829) (equating “natural born subject or citizen”); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 166 (1874) (the choice between the terms “subject,” “inhabitant,” and “citizen,” “is sometimes made to depend upon the form of the government”).¹

¹ *See also* John A. Hayward, *Who Are Citizens?*, 2 AM. L.J. 315 (1885) (“The word [citizen] as used in the articles of confederacy and the constitution must have had the same acceptation and meaning as subject. The only difference being that a subject is under subjection to a monarch, and a citizen is under subjection to a government of which he is a component part.”); Munroe Smith, *Nationality, Law of*, in 2 CYCLOPAEDIA OF POLITICAL SCIENCE, POLITICAL ECONOMY, AND OF THE POLITICAL HISTORY OF THE UNITED STATES BY THE BEST AMERICAN AND EUROPEAN WRITERS, 941, 942 (John J. Lalor ed., 1883) (“citizen” supplanted

The English rule was simple. Those born within lands over which the English king's sovereignty extended were subjects of the King of England. Or, as pre-revolutionary courts would have explained, those who were born on any soil under the sovereign power of the King of England were his "natural liege subjects" and were properly considered "natural born" subjects under the law. *Calvin's Case*, Eng. Rep. 377, 409 (1608); *see also id.* at 399. As Chief Justice Coke stated in *Calvin's Case*, "all those that were born under one natural obedience while the realms were united under one sovereign, should remain natural born subjects, and no aliens." *Id.* at 409. It was "universally admitted, both in the English courts and in those of our own country," that the rule extended beyond those born within the boundaries of the British Isles to "all persons born within the colonies of North America, whilst subject to the crown of Great Britain." *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 120 (1830). The Supreme Court has long recognized this "fundamental principle of the common law," that "English nationality . . . embraced all persons born within the king's allegiance, and subject to his protection." *Wong Kim Ark*, 169 U.S. at 655.

"subject" because the latter was "historically associated with the theories of feudal and absolute monarchy, and has thus fallen into disfavor.").

The English common law rule had an important exception. Those who owed allegiance to a foreign sovereign—for example, children of diplomats and persons born under hostile occupation—were not subjects of the King of England even if they were born on English lands. *See* Thomas P. Stoney, *Citizenship*, 34 AM. L. REG. 1, 13 (1886); *Calvin’s Case*, 77 Eng. Rep. at 399. In other words, those born outside of allegiance to the nation were outside of the reach of the citizenship rule inherited from England.

Many early U.S. cases echo the English rule. The Supreme Judicial Court of Massachusetts’s approach to citizenship provides a case in point:

[A] man born within the jurisdiction of the common law, is a citizen of the country wherein he is born. By this circumstance of his birth, he is subjected to the duty of allegiance which is claimed and enforced by the sovereign of his native land and becomes reciprocally entitled to the protection of that sovereign, and to the other rights and advantages which are included in the term “citizenship.”

Gardner v. Ward, 2 Mass. 244 (1805). Indeed, the Supreme Court went so far as to say that “[n]othing [was] better settled at the common law than the doctrine that the children even of aliens born in a country . . . are subjects by birth.” *Sailor’s Snug Harbor*, 28 U.S. at 164 (1830). No matter “how accidental soever his birth in that place may have been, and although his parents belong to another country,” the country of one’s birth “is that to which he owes allegiance,” *Leake*, 13 N.C. 73 (1829), and that birth “does of itself constitute citizenship,” *Lynch*, 1 Sand. Ch. 583

(1844). *See also United States v. Rhodes*, 27 F. Cas. 785, 789 (Swayne, Circuit Justice, C.C.D. Ky. 1866) (No. 16,151) (“[A]ll persons born in the allegiance of the United States are natural[-]born citizens.”). Even a person “born within the United States” who later emigrated, “not being proved to have expatriated himself according to any form prescribed by law, is said to remain a citizen, entitled to the benefit and subject to the disabilities imposed upon American citizens.” *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 120 (1804). *See also Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 165-66 (1795) (a person born in Virginia who later moves to France is still a citizen of the United States); Bernadette Meyler, *The Gestation of Birthright Citizenship, 1868-1898 State’s Rights, the Law of Nations, and Mutual Consent*, 15 GEO. IMMIGR. L. J. 519, 527-32 (2001).

In the writings of the Framers there is similar evidence of a Founding-era commitment to determining citizenship by the English common law rule. For example, James Madison noted in 1789, the year the Constitution came into effect, that “[i]t is an established maxim that birth is a criterion of allegiance. Birth however derives its force sometimes from place and sometimes from parentage, but in general place is the most certain criterion; it is what applies in the United States; it will therefore be unnecessary to investigate any other.” 1 ANNALS OF CONG. 420 (1789) (Joseph Gales ed., 1834).

U.S. courts also followed the English common law in recognizing that there were some distinct classes of people born within the dominion of the United States who were not “born within the allegiance” of the United States, and therefore were not citizens—namely children of diplomats and those born under foreign occupation. *Sailor’s Snug Harbor*, 28 U.S. at 155-56; *Wong Kim Ark*, 169 U.S. at 682. American judges further recognized the unique situation of Native Americans, who, although “born within the territorial limits of the United States,” were “members of, and ow[ed] immediate allegiance to, one of the Indian tribes.” *Elk v. Wilkins*, 112 U.S. 94, 102 (1884).² Accordingly, *Elk* held that Native Americans “are no more ‘born in the United States and subject to the jurisdiction thereof,’ within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.” *Id.*; see also *Ex parte Reynolds*, 20 F. Cas. 582, 583 (C.C.W.D. Ark. 1879) (No. 11,719) (“[N]ot being subject to the jurisdiction of the United States, [Indians]

² Native American tribes were viewed as “domestic dependent nations,” separate from the United States. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

are not citizens thereof. . . . Indians, if members of a tribe, are not citizens or members of the body politic.”).³

B. The Sole, Narrow Exception to the Doctrine of *Jus Soli* Citizenship Arose in the Infamous *Dred Scott* Case and Was Quickly Reversed by the Civil War and Fourteenth Amendment.

In antebellum America, the rule that birth within the territory and allegiance of the nation ensured citizenship admitted of one clear and notable departure: *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857). *Dred Scott* denied citizenship to African Americans born within, and owing undivided allegiance to, the United States. This exception was grounded in racial exclusion. The Supreme Court held that African Americans were not United States citizens because “they were . . . considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.” *Dred Scott*, 60 U.S. at 404-05. But *Dred Scott*’s departure from the general rule only supports Plaintiffs’ claims in this case because *Dred Scott* provides the backdrop against which the Fourteenth Amendment’s codification of the background rule was adopted.

³ The Indian Citizenship Act of 1924 enacted birthright citizenship for Native Americans. 8 U.S.C. § 1401(b).

C. The Fourteenth Amendment Constitutionalized *Jus Soli*, Confirming that Birthright Citizenship Applies to All Those Born Within the Geographic Boundaries of the United States.

The Fourteenth Amendment constitutionalized the common law rule that birth within the nation’s territory and allegiance bestowed citizenship. *See* Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L. J. 2134, 2153 (2014) (the Fourteenth Amendment “constitutionalized *jus soli* citizenship”). That amendment’s Citizenship Clause repudiated *Dred Scott*’s race-based exception to citizenship, so that “[a]ll persons born . . . in the United States, and subject to the jurisdiction thereof”—including African Americans—were deemed “citizens of the United States.” U.S. CONST. amend. XIV, § 1 (emphasis added); *In re Look Tin Sing*, 21 F. 905, 909 (C.C.D. Cal. 1884) (noting that the Citizenship Clause was meant to “overrule” *Dred Scott* and grant citizenship to African Americans). The debates in the Senate over the Fourteenth Amendment make clear that the Citizenship Clause was aimed at putting freed slaves and other African Americans in the same position with respect to citizenship as all other people born in the United States. As Senator John Henderson noted in 1866: “I propose to discuss the first section [of the Fourteenth Amendment] only so far as citizenship is involved in it. I desire to show that this section will leave citizenship where it now is. It makes plain only what has

been rendered doubtful by the past action of the Government.” CONG. GLOBE, 39TH CONG., 1ST SESS. 3031 (1866) (then identifying *Dred Scott* as the case that erroneously introduced doubts). His colleague, Senate Judiciary Chairman Lyman Trumbull, similarly announced his understanding that the Fourteenth Amendment recognized that “persons born in the United States and owing no allegiance to any foreign Power are citizens without regard to color.” CONG. GLOBE, 39TH CONG., 1ST SESS. 574 (1866).

The Supreme Court in *United States v. Wong Kim Ark* confirmed that the Fourteenth Amendment follows the “established” and “ancient rule of citizenship by birth within the dominion” and allegiance of the nation—that “[e]very person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization.” 169 U.S. at 674, 667, 702.⁴ Born in San Francisco in 1873 to Chinese nationals, Wong Kim Ark had been denied reentry to the United States following a trip to China on the ground that he was not a U.S. citizen. *Id.* at 649-51. The Supreme Court rejected that analysis, declaring that “there is no authority, legislative, executive, or judicial” which “superseded or

⁴ As *Wong Kim Ark* made clear in reaffirming *jus soli* in the United States, “Two things usually concur to create citizenship: First, birth locally within the dominions of the sovereign; and, secondly, birth within the protection and obedience, or, in other words, within the ligeance, of the sovereign.” 169 U.S. at 659.

restricted, in any respect, the established rule of citizenship by birth within the dominion.” *Id.* at 674; *see also id.* at 703 (“The fourteenth amendment . . . has conferred no authority upon congress to restrict the effect of birth, declared by the constitution to constitute a sufficient and complete right to citizenship.”).⁵

D. At the Time of the Ratification of the Fourteenth Amendment, *Jus Soli* Citizenship Was Understood to Include Persons Born in the Territories of the United States.

The geographic scope of the Fourteenth Amendment is informed by the common understanding at the time it was ratified. Under the English common law rule that the Fourteenth Amendment codified, the doctrine extended beyond the boundaries of England to encompass any territory under the sovereignty of the King of England: “whosoever [wa]s born within the fee of the King of England, though it be in another kingdom, [wa]s a natural-born subject.” *Calvin’s Case*, 77 Eng. Rep. at 403. In the seventeenth and eighteenth centuries, jurists extended the principle beyond the British Isles to overseas colonies under the sovereignty of the King of England. Persons born in all territories held by the King, and thus “into the King’s

⁵ The political branches lacked the authority to diminish the force of this constitutional imperative when they enacted legislation recognizing citizenship for persons in some territories (such as Guam or Puerto Rico) without enacting similar legislation for American Samoa. *See, e.g., Stoney, supra*, at 2 (“[C]itizenship founded on birth is recognized and guaranteed by the constitution . . . and cannot be affected by legislation.”).

allegiance,” were his subjects. Polly J. Price, *Natural Law and Birthright Citizenship in Calvin’s Case* (1608), 9 YALE J. L. & HUMAN. 73, 86-87 (1997). The American colonists were themselves “subjects of the crown of Great Britain.” 1 WILLIAM BLACKSTONE, COMMENTARIES *106-109; *see also Sailor’s Snug Harbor*, 28 U.S. at 120-21 (“[A]ll persons born within the colonies of North America, whilst subject to the crown of Great Britain, were natural[-]born British subjects.”).

This doctrine was incorporated into American law. And before the twentieth century, our courts made little distinction, on questions of citizenship status, between the states and the territories. Justice Story declared that “[a] citizen of one of our territories is a citizen of the United States.” *Picquet v. Swan*, 19 F. Cas. 609, 616 (C.C.D. Mass. 1828) (No. 11,134). William Rawle took a similar view in his influential commentary, *A View of the Constitution of the United States* (1829), where he wrote that “every person born within the United States, its territories or districts, whether the parents are citizens or aliens, is a natural born citizen in the sense of the Constitution.” *Id.* at 86. As discussed above, that principle, that “every person born within the dominions and allegiance of the United States . . . is a natural born citizen,” governed American jurisprudence from the Founding through the

nineteenth century. *Lynch*, 1 Sand. Ch. 583 (1844); *see also Look Tin Sing*, 21 F. at 909 (1884); *Wong Kim Ark*, 169 U.S. at 659, 688.⁶

That is why the Supreme Court expressly contemplated in 1898 that one born outside of the established states, yet still within the jurisdiction of the United States, could lay claim to being a citizen. *See Wong Kim Ark*, 196 U.S. at 677 (“[A] man [may] be a citizen of the United States without being a citizen of a state. . . . [I]t is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.”) (internal citation omitted). Indeed, after the Fourteenth Amendment, being subject to U.S. jurisdiction no more depended on birth within an established state than on membership in a particular racial, cultural, or social category. *See id.* at 693 (“The [Fourteenth] amendment, in clear words and in manifest intent, includes the children born within the territory of the United States

⁶ The question of citizenship status discussed here is of course distinct from the issue of rights. Both English law and later U.S. law envisioned that citizens in a colony or territory would not have the exercise of the full range of civil or political rights that they enjoyed elsewhere. *See* BLACKSTONE, COMMENTARIES *107 (“[A]ll the English laws then in being, which are the birthright of every subject, are immediately there [*i.e.*, in the American colonies] in force. But this must be understood with very many and very great restrictions.”); Northwest Ordinance (1787), 32 JOURNALS OF THE CONT’L CONG. 334-43 (property rights in slaves were not permitted to migrants to the Northwest Territory).

of all other persons [besides those owing allegiance to non U.S. sovereigns], of whatever race or color, domiciled within the United States.”).⁷

II. The Anomalous Concept of a Non-citizen National Was Invented by the Political Branches.

The term “non-citizen national” is a twentieth-century invention of the federal agencies and political branches that the Supreme Court has never embraced.⁸ Although English common law recognized the status of denizen, which shared some characteristics with the non-citizen national, early U.S. jurisprudence (as explained below) both implicitly and explicitly repudiated that status. The sole exception to that rule during the first half of the nineteenth century, like the sole exception to the principle of *jus soli*, was the African American.⁹ The idea that African Americans

⁷ Justice Gray’s opinion for the majority in *Wong Kim Ark* also declined the government’s invitation to conceive of allegiance as embodying racial and cultural affiliation, and instead “focused on obedience to the laws as the essential element of allegiance, and on the authority of the national government to compel the obedience of all within its geographical boundaries.” Lucy E. Salyer, *Wong Kim Ark: The Contest Over Birthright Citizenship*, in IMMIGRATION STORIES 51, 72, 75 (David A. Martin and Peter H. Schuck eds., 2005). See also *Wong Kim Ark*, 169 U.S. at 683-88, 690, 693.

⁸ In *Miller v. Albright*, 523 U.S. 420, 467, n.2 (1998), the plaintiff sought recognition as a U.S. citizen as a result of her birth outside the United States to a U.S. citizen father. The decision did not address the question of the Constitution’s codification of *jus soli*, and does not support the proposition that the Supreme Court *embraced* the unconstitutional non-citizen national status.

⁹ As noted, Native Americans were a special case of a different sort: neither denizens nor citizens, but generally treated as aliens due to their allegiance to sovereign tribes.

inhabited an intermediate status between citizen and alien, however, never gained broad acceptance in American law and was repudiated after the Civil War.

English common law, on the eve of the American Revolution, and as interpreted in its most authoritative form by William Blackstone, envisioned four possible statuses: subject, naturalized subject, alien, and denizen. Subjects, those born within allegiance to the king, owed indissoluble allegiance to the crown. 1 BLACKSTONE, COMMENTARIES *369 (“Natural allegiance is therefore a debt of gratitude, which cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance”). Naturalized subjects, who had acquired English subjecthood later in life, had an identical status except that they were not permitted to hold certain high offices. *Id.* at *374. An alien owed “local” or temporary allegiance to the English crown, but only so long as he was “within the king’s dominion and protection”—his allegiance “cease[d] the instant such stranger transfer[ed] himself from [that] kingdom to another.” *Id.* at *370; *see also id.* at *372. And finally, “[a] denizen is in a kind of middle state between an alien, and natural-born subject, and partakes of both of them,” Blackstone explained. *Id.* at *374. One became a denizen by acquiring royal letters patent which made one “an English subject;” however, the denizen still lacked certain civil and political rights. *Id.* at *374.

The categories of naturalized subject (or naturalized citizen) and denizen were both repudiated by the jurisprudence of the early United States. First, U.S. law never drew any significant distinction between naturalized and native-born citizens, and indeed explicitly repudiated any such distinction in virtually every case. *See, e.g., Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 827-28 (1824) (“[The naturalized citizen] is distinguishable in nothing from a native citizen, except so far as the constitution makes the distinction. The law makes none.”). Article I, section 2 of the U.S. Constitution gave naturalized citizens the same right to high office as native-born citizens, with the sole exception of the presidency, which (after the Founders’ generation) was reserved to “natural born citizen[s],” U.S. CONST. art. II, § 1. Contemporaries understood this to be the intent of those provisions. *See The Republican Federalist VI* (Feb. 2, 1788), in 1 THE COMPLETE ANTI-FEDERALIST 195 (Herbert J. Storing ed., University of Chicago 1981). All subsequent efforts during the 1790s to draw distinctions between the status of native-born and naturalized citizens were rejected. *See, e.g.,* 8 ANNALS OF CONG. 1580 (1798).

Second, the category of “denizen” also was ignored or explicitly repudiated in U.S. law. The 1777 Vermont Constitution used “denizen” as a synonym for “citizen,” indicating that it did not denote a separate status. VT. CONST. of 1777, ch. 2, § xxxviii (“Every foreigner of good character, who comes to settle in this State,

having first taken an oath or affirmation of allegiance to the same, . . . after one years residence, shall be deemed a free denizen thereof, and intitled to all the rights of a natural born subject of this State.”). When Chief Justice Taylor of the North Carolina Supreme Court explained in 1824 that aliens (non-citizens) were barred from obtaining membership to the state bar, he confirmed that “[t]he middle state in which the common law places a denizen is unknown here” in the United States. *Ex Parte Thompson*, 10 N.C. (3 Hawks) 355, 361 (1824). Rather, he wrote, “all [free white] persons . . . residing here, are either citizens or aliens . . .” *Id.*

A small number of courts in a handful of cases during the first half of the nineteenth century suggested that free African Americans inhabited a middle state between citizen and alien. The Kentucky Court of Appeals, for example, described them as “quasi citizens, or, at least, denizens.” *Rankin v. Lydia*, 9. Ky. (2 A. K. Marsh) 467, 476 (1820), *quoted in Dred Scott*, 60 U.S. at 562 (McLean, J. dissenting). This view, however, never won broad acceptance at the national level, nor was it ever adopted by the U.S. Supreme Court. Even *Dred Scott*, declaring that native-born African Americans were not citizens, did not adopt the language of denizenship and so stopped short of expressly recognizing a third status beyond citizen and alien. 60 U.S. at 457. Moreover, the Fourteenth Amendment later made clear that African Americans were citizens of the United States, and not denizens.

As House Judiciary Chairman James F. Wilson noted in support of the Civil Rights Act of 1866, the “pestilent doctrines of the *Dred Scott* case” providing that the United States had “six million persons in this Government subject to its laws, and liable to perform all the duties and support all the obligations of citizens, and yet who are neither citizens nor aliens,” was “an absurdity which cannot survive long in the light of these days of progressive civilization.” CONG. GLOBE, 39TH CONG., 1ST SESS. 1116-17 (1866). And indeed, it did not.

In sum, the best available evidence suggests that by 1898, the U.S. Constitution, state constitutions, and American courts had long established a binary division of nontribal inhabitants into citizens and aliens. During the revolutionary and early Republican periods (ca. 1776-1830), they explicitly repudiated the intermediate categories (denizen and naturalized subject) that had existed in English common law. To a limited extent, some antebellum state courts tried to repurpose the status of denizen into a race-based category for free African Americans—though without significant success. The aftermath of the Civil War conclusively erased any vestige of the category of denizen, however, affirming the binary division of inhabitants into citizens and aliens.

Further, the Supreme Court later refused to narrow *jus soli* citizenship for all people born within U.S. allegiance and sovereignty. As Professor Lucy Salyer has

shown, *Wong Kim Ark* was a test case brought by the federal government after years of efforts by federal officials to exclude Chinese born in the United States from U.S. citizenship on the basis of racial and cultural differences. Lucy E. Salyer, *Wong Kim Ark: The Contest Over Birthright Citizenship*, in *IMMIGRATION STORIES* 51, 66 (David A. Martin and Peter H. Schuck eds., Foundation 2005). As the federal government told the Court, those of Chinese descent should not benefit from *jus soli* citizenship because they “were not recognized as part of the community, deserving of rights.” *Id.* at 71 (citing Br. for United States at 11-13, *Wong Kim Ark*, 169 U.S. 649 (No. 132)). Arguing that the children of Chinese subjects were irreducibly foreign despite birth within the United States, the government implored the Court to deem them to be born outside of American allegiance and jurisdiction and thus outside of the Fourteenth Amendment *jus soli* citizenship guarantee. *Id.* at 68.

Despite the Court’s “separate but equal” distinction for racial minorities just two years earlier, *Plessy v. Ferguson*, 163 U.S. 537, 553 (1896) (Harlan, J., dissenting); *see id.* at 548 (majority opinion), the Court nonetheless resoundingly rejected the government’s argument as inconsistent with the dictates of the Fourteenth Amendment. The Court held the fact “that acts of congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the

operation of the broad and clear words of the constitution: ‘All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States.’” *Wong Kim Ark*, 169 U.S. at 704.

To be sure, despite having been unwilling in 1898 to give legal form to race-based arguments for limiting *jus soli* citizenship, the Court expressed sympathy for such logic in 1901 when it issued its first decisions addressing the status of the people and places that the United States had acquired in 1898-1899. In *Downes v. Bidwell*, 182 U.S. 244 (1901), a fractured majority of the Court held that the constitutional requirement of tariff uniformity within the United States did not apply to all recently acquired U.S. lands. *Id.* at 278. Digressing to discuss naturalized citizenship and race, Justice White hypothesized: “Citizens of the United States discover an unknown island, peopled with an uncivilized race, yet rich in soil Can it be denied that such right [to acquire] could not be practically exercised if the result would be to endow the inhabitants with citizenship of the United States” *Id.* at 306. Justice Brown, who provided the fifth vote for the judgment in the case, echoed Justice White’s concern with incorporating in the body politic persons of an unfamiliar culture: “Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they

may be to our habits, traditions, and modes of life, shall become at once citizens” *Id.* at 279-80.

The federal government perceived an opportunity in *Gonzales v. Williams*, 192 U.S. 1 (1904), to build on the race-based discomfort of these justices with the prospect of U.S. citizenship for all peoples in recently acquired U.S. territories. That case involved Puerto Rican Isabel Gonzales’s challenge to the decision of Ellis Island officials to exclude her, under the immigration laws, from the mainland as an undesirable alien.¹⁰ *Id.* at 7. The government framed the case as turning on whether Gonzales was a citizen. *Id.* at 12 (“Counsel for the government contends that the test of Gonzales’ rights was citizenship of the United States and not alienage.”). In asking the Court to hold that she was not, the government cast the peoples of newly acquired territories as racially inferior. As Professor Sam Erman summarizes, the government argued that these populations “were remote in time, space, and culture and suffered . . . problems of climate, overcrowding, primitive hygiene, low standards of living and moral conduct, and the extreme and willing indigency that characterized the tropics.” Samuel C. Erman, *Puerto Rico and the Promise of United*

¹⁰ *Gonzales* involves a wrinkle not at issue here. While all American Samoans alive today were born after U.S. annexation of American Samoa, Isabel Gonzalez was born prior to U.S. annexation of Puerto Rico. *Id.* at 12.

States Citizenship: Struggles around Status in a New Empire, 1898-1917, 161 (2010) (unpublished Ph.D. dissertation, University of Michigan).¹¹

Gonzales’s lawyer met appeals to the supposed racial sanctity of citizenship with reference to the *Dred Scott* case. Surveying U.S. legal history, he perceived that that case had, “for the first time in our history,” declared “that in the United States there were persons who, although subjects, were yet not citizens.” Frederic R. Coudert, Jr., *Our New Peoples: Citizens, Subjects, Nationals, or Aliens*, 3 COLUM. L. REV. 13, 16-17 (1903). In a prior case, he had warned the Court against repeating the *Dred Scott* mistake of finding that “under the Constitution” some U.S. peoples were “something different and apart from the rest of humanity,” Br. for Pl.’s in Error at 95, *De Lima v. Bidwell*, 182 U.S. 1 (1901) (No. 456), for such “views” had been “repudiated by the American people in the Civil War, by three amendments to the Constitution of the United States, by this court, and by forty years of advancing civilization,” *id.* at 99. In *Gonzales*, he cautioned justices not to make “recourse to . . . precedents in our history of which we are least proud” to reach a “peculiar, and, from a standard of American civilization, most anomalous result.” Br. of Pet’r 39, *Gonzales*, 192 U.S. 1 (1903) (No. 225).

¹¹ Available at http://deepblue.lib.umich.edu/bitstream/handle/2027.42/75920/samerman_1.pdf;jsessionid=DC1A398F49F0A44C3677ADEC3A6D6DB0?sequence=1 (last visited March 26, 2018).

In addition to being bad law, Gonzales’s lawyer argued, *Dred Scott* was racially inapplicable. The decision, he had told the Court in 1901, “was due to the peculiar incidents of our history which made the negro something different from the ordinary human being—half man, half beast.” Br. for Pl.’s in Error at 84, *DeLima* (No. 456). He then laid out for the justices the disabilities that free antebellum African Americans had faced. Not only could they not exercise political rights; they had not been acknowledged to have any rights at all. Opening Argument of Mr. Coudert for Pl. in Error at 43, *Downes v. Bidwell*, 182 U.S. 244 (1901) (No. 507) (arguing that “no rights had ever been acknowledged” to inhere in “that race”) (emphasis added)); *see also* Br. of Pet’r 29, 32, *Gonzales*, 192 U.S. 1 (1903) (No. 225). And unique among Americans, they were “capable of being made property . . . even when [previously] manumitted.” Opening Argument of Mr. Coudert for Pl. in Error at 43, *Downes v. Bidwell*, 182 U.S. 244 (1901) (No. 507).

Facing the competing pulls of a racial exclusion from U.S. citizenship and fidelity to precedent, the Court took a narrow and unanimous approach. It held that Puerto Ricans were not aliens, hence not subject to existing immigration restrictions. *Gonzales*, 192 U.S. at 15. As to whether they were U.S. citizens, the Court expressly declined to provide an answer. *Id.* at 12.

Unfortunately, *Gonzales* has sometimes been read to have resolved the very question—*i.e.*, the citizenship status of Puerto Ricans or others born in U.S. territories—that the Court reserved. *See, e.g.*, Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change*, 102 CALIF. L. REV. 1181, 1228 n.305 (2014); OFFICE OF DIRECTIVES MANAGEMENT, U.S. DEPARTMENT OF STATE, 7 U.S. DEPARTMENT OF STATE FOREIGN AFFAIRS MANUAL 1121.2-2 (Oct. 10, 1996), <https://fam.state.gov/fam/07fam/07fam1120.html> (last visited March 26, 2018) (claiming that the Court “developed the rationale that . . . [i]nhabitants of territories acquired by the United States acquire U.S. nationality—but not U.S. citizenship”). In reality, the Supreme Court never resurrected the *Dred Scott* distinction between citizenship and nationality. And its unrealized musings in scattered opinions entertaining such a result in *Downes v. Bidwell* were a product of the types of race-based thinking and actions that the Fourteenth Amendment sought to and does prohibit. *See, e.g., Downes*, 182 U.S. at 306 (opinion of White, J.).

Although the Court never recognized the existence of non-citizen nationals in intervening years, federal lawmakers and administrators embraced the category as a means to achieve race-based goals.¹² Congressional debates on the status of Puerto

¹² For an early example of elected federal officials attempting to carve out a category between citizen and alien, *see* Act of June 14, 1902, Pub. L. No. 57–158,

Rico following its cession to the United States provide a representative example. Shortly before *Gonzales*, Congress considered what became known as the Foraker Act, Pub. L. No. 56-191, 31 Stat. 77 (1900), which established a civil government for Puerto Rico. The original version of this bill would have recognized the U.S. citizenship of Puerto Ricans. José A. Cabranes, *Citizenship and American Empire: Notes on the Legislative History of United States Citizenship of Puerto Ricans*, 127 U. PA. L. REV. 391, 427 (1978) (citing S. 2264, 56th Cong., 1st Sess., (1900) (unamended version)). But the bill sparked a debate “frequently filled with racist rhetoric,” and reflecting a “fear” regarding the potential legislative precedent the bill would set for other non-white territories. *Id.* at 429-30. Largely to avoid the consequence of bringing such populations into the national fold, the version of the Foraker Act that passed included no provision concerning the U.S. citizenship status of Puerto Ricans. *Id.* at 432-33.

32 Stat. 386, codified at 22 U.S.C. § 212 (altering the passport law, which had previously authorized the issuance of passports to citizens only, to permit instead issuance to no “other persons than those owing allegiance, whether citizens or not, to the United States”). For more on the relationship between racism and U.S. expansion after the Fourteenth Amendment, *see, e.g.*, ERIC T. LOVE, *RACE OVER EMPIRE: RACISM AND U.S. IMPERIALISM, 1865-1900* (2004); PAUL A. KRAMER, *THE BLOOD OF GOVERNMENT: RACE, EMPIRE, THE UNITED STATES, & THE PHILIPPINES* (2006); MARILYN LAKE AND HENRY REYNOLDS, *DRAWING THE GLOBAL COLOUR LINE: WHITE MEN’S COUNTRIES AND THE INTERNATIONAL CHALLENGE OF RACE EQUALITY* (2008).

In sum, a non-citizen national status did not exist at the Founding, was eradicated by the Fourteenth Amendment, and has never been resurrected by the Court. Lawmakers and administrators who attempted to breathe new life into the term years ago were doomed to repeat the mistakes that led to *Dred Scott*. They have acted contrary to clear precedent and constitutional text based upon racial classifications and animus.

CONCLUSION

Amici respectfully submit that the historical and Constitutional record supports recognizing birthright citizenship for persons born into American allegiance in any U.S. territory, including the territory of American Samoa.

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Respectfully submitted,

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APPENDIX A

This Appendix provides *amici*'s titles and institutional affiliations for identification purposes only, and not to imply any endorsement of the views expressed in this Brief by *amici*'s institutions.

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